Supreme Court, U. S.
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MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-520

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioner,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION OF RESPONDENT THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA.

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STATEMENT OF THE CASE.

Supplementing the statement of the case contained in the petition, petitioner The Board of School Commissioners of the City of Indianapolis, Indiana (sometimes referred to by the courts below and in the petition as "IPS"),. took an appeal from the judgment entered by the district court on August 1,

1975 (A47-A50), to the United States Court of Appeals for the Seventh Circuit, where it was docketed as No. 75-1765. The petitioner's brief, as an appellant in the court of appeals, stated the issues presented for review as follows:

> "1. Whether the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken* v. *Bradley* (1974), 418 U.S. 717, when:
>
> > "a. The only school system found to be *de jure* segregated is the Indianapolis Public School system governed by the Defendant, The Board of School Commissioners of the City of Indianapolis (hereinafter sometimes referred to as 'IPS');
> >
> > "b. The remaining school systems located within Marion County, Indiana, were expressly found by the Court not to be *de jure* segregated, which finding was affirmed by this Court of Appeals;
> >
> > "c. The basic rationale of the District Court in the imposition of an inter-district remedy is the Court's assumption that a desegregation plan for 'IPS' only, which is approximately 41% black, would be unconstitutional ('In the long haul it won't work.') even though the Supreme Court in *Milliken* v. *Bradley, supra,* has held that the Detroit system (with approximately 64% black student population) could be constitutionally desegregated, and
> >
> > "d. When a unitary school system within the meaning of the Fourteenth Amendment to the Constitution of the United States can be implemented (if not already accomplished) within the boundaries of 'IPS.'
>
> "2. Whether the District Court exceeded the limited remand of this Court." (Brief, pp. 1-3.)

As noted in the petition, this action was originally commenced by respondent United States of America against the petitioner. Following the decision of the district court on August 18, 1971

(332 F. Supp. 655), that petitioner's school system was unconstitutionally segregated, respondent United States, although it caused the respondent school corporations to be added as defendants, failed and refused to assert any claim against them seeking interdistrict relief. Thereupon, the district court allowed respondents Buckley to intervene and to assert such a claim. In its memorandum of decision dated August 1, 1975, the district court found, in connection with the right of respondents Buckley to recover a reasonable attorney's fee pursuant to 20 U. S. C. § 1617, as follows:

> "* * * It is the Court's opinion that the Buckley plaintiffs should be regarded as the 'prevailing parties,' within the meaning of such statute, if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket." (A46.)

Although respondent United States of America was adjudged by the district court not to be the prevailing party, it took no appeal from the judgment entered on August 1, 1975. (A47-A50) It appeared in the appeals taken by petitioner and the respondent school corporations as an appellee. Nevertheless, in its appellee's brief it argued that the remedy ordered by the district court was error, contending:

> "There are ample reasons why the district court's order requiring mandatory transfers of black I.P.S. students in order to achieve a 15% black ratio in eight of the 10 added defendant school districts cannot be squared with prevailing legal standards. Foremost among these is that such mandatory transfers across district lines are not related to the nature of nor necessary to correct any constitutional violations identified by the district court." (Page 28.)

Respondent United States asked the court of appeals to vacate the judgment of the district court and to remand the case to the district court for modifications in the judgment. In suggesting a proper disposition on remand, respondent United States argued

that "a provision permitting the voluntary transfers of black students residing within I. P. S. to the added defendant districts, in conjunction with the final desegregation of I. P. S. schools, would be in tune with the inter-district effects of racial discrimination found by the district court, and otherwise makes sense." (Brief, page 32) Respondent United States further argued that "such a provision would be completely consistent with Equal Education Opportunity Act of 1974." (Brief, page 33, note 43) The court of appeals rejected these arguments. (A24-A25)

ARGUMENT.

Petitioner's argument in the court of appeals for reversal of the judgment of the district court was to the effect that there was no constitutional violation that would warrant an interdistrict remedy under the authority of *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Petitioner further argued that a unitary school system within the boundaries of IPS was workable, and that petitioner was ready, willing and able to implement a final desegregation plan within its own boundaries if permitted to do so by the district court. Petitioner neither presented nor argued in the court of appeals any of the issues embodied in the questions presented by its petition for writ of certiorari filed in this Court. It concedes this on page 26 in the conclusion of its petition.

In asking this Court to review the judgment of the court of appeals on writ of certiorari, petitioner no longer challenges the holding of the district court, affirmed by the court of appeals, that a constitutional violation calling for an interdistrict remedy occurred. As stated in footnote 14 on page 26 of the petition:

> "* * * The new board majority [of petitioner] favors some kind of interdistrict remedy involving IPS and other Marion County systems but opposes the particular remedy decreed by the District Court, for the reasons suggested herein. Accordingly, the arguments for reversal which IPS presented to the Court of Appeals are not pursued in this Court."

The petition for writ of certiorari presents no question for review, because it is well settled that, where issues are neither raised before nor considered by the court of appeals, the Supreme Court will not ordinarily consider them. *E.g., United States* v. *Ortiz,* 422 U. S. 891, 898 (1975); *Bivens* v. *Six Unknown Named Agents,* 403 U. S. 388, 397-98 (1971); *Adickes* v. *Kress & Co.,* 398 U. S. 144, 147, footnote 2 (1970). Moreover, when certiorari has been granted, the writ will be dismissed where it appears from the record that the questions have not been properly raised, litigated or passed upon below. *McCullough* v. *Kammerer Corporation,* 323 U. S. 327 (1945). And in determining whether an issue has been raised by a party in the court of appeals, the Supreme Court may examine the party's brief below. *United States* v. *Ortiz, supra.*

Petitioner contends that "issues concerning the nature and scope of the interdistrict remedy ordered and its disparate burden on black children, as well as the possible application of the Equal Educational Opportunities Act of 1974, were raised in the brief of the United States filed in [the court of appeals], although not discussed in the court's opinion." (Petition, p. 26) But respondent United States appeared in the court of appeals solely as an appellee. It filed no appeal. As an appellee, it was bound by the judgment of the district court and had no standing to be heard except in support of the judgment. *Helvering* v. *Pfeiffer,* 302 U. S. 247, 250-51 (1937); *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185, 191-92 (1937). Consequently, the issues asserted by petitioner were not properly raised by respondent United States in the court of appeals and, in any event, were not passed upon by that court.

All of the issues properly raised, litigated and passed upon below are otherwise before this Court by appeals in Nos. 76-212, 76-458 and 76-468, and by petitions for writs of certiorari in Nos. 76-515 and 76-522.

CONCLUSION.

For the foregoing reasons, the petition of petitioner The Board of School Commissioners of the City of Indianapolis, Indiana, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 16, 1976, should be denied.

Respectfully submitted,

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